

1 Daniel R. Bentson, WSBA #36825
2 E-mail: dan.bentson@bullivant.com
3 BULLIVANT HOUSER BAILEY PC
4 1700 Seventh Avenue, Suite 1810
5 Seattle, Washington 98101-1397
6 Telephone: 206.292.8930
7 Facsimile: 206.386.5130

8 Attorneys for Plaintiff Berkley Assurance
9 Company

10

11 IN THE UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON
13 AT SPOKANE

14

15 BERKLEY ASSURANCE COMPANY,
16 a foreign corporation,

17 Plaintiff,

18 v.

19 INLAND WASHINGTON, LLC, a
20 Washington limited liability company;
21 and RS CONSTRUCTION &
22 EXCAVATION, INC., a Washington
23 corporation,

24 Defendants.

25 No.:

26 COMPLAINT FOR DECLARATORY
JUDGMENT

JURY DEMAND

27 Plaintiff Berkley Assurance Company files this Complaint for Declaratory
28 Judgment and states as follows:

29

I. THE PARTIES

30 1.1 **Plaintiff.** Berkley Assurance Company (“Berkley”) is an Iowa
31 corporation with its principal place of business in Scottsdale, Arizona.

32 1.2 **Defendant.** Inland Washington, LLC (“Inland Washington”) is a
33 Washington limited liability company. Upon information and belief, its members

1 | are Washington citizens.

2 1.3 **Defendant.** RS Construction & Excavation, Inc. (“RS Construction”)
3 is a Washington corporation, with its principal place of business in Kent,
4 Washington.

II. JURISDICTION AND VENUE

6 2.1 **Jurisdiction.** Because there is complete diversity between the parties
7 and the amount in controversy exceeds \$75,000, exclusive of interest and costs,
8 this Court has subject matter jurisdiction over this action under 28 U.S.C. §§
9 1332(a)(1) and 2201(a).

10 2.2 **Venue.** Inland Washington resides in Spokane, Washington, and,
11 therefore, under 28 U.S.C. § 1391(b), venue is proper in this Court.

III. FACTS

13 3.1 Inland Washington is a general contractor that specializes in high-
14 density residential development and construction.

15 3.2 On or about October 23, 2013, Inland Washington hired RS
16 Construction to perform earthwork, excavation, grading, and utility services as part
17 of a project to construct the Copper Trail Apartments in Olympia, Washington (the
18 “Project”).

19 3.3 On or about March 16, 2014, Berkley issued Policy Number VUMB
20 0055950 (the “Policy”) to RS Construction. The Policy provided commercial
21 general liability coverage, subject to its terms, conditions, limitations, and
22 exclusions. A true and correct copy of the Policy is attached as **Exhibit A**.

23 3.2 Coverage under the Policy inceptioned on March 16, 2014, and,
24 originally, the Policy was scheduled to expire on March 16, 2015. But because RS
25 Construction failed to pay the premiums owed under the Policy, Berkley canceled
26 the Policy on October 11, 2014.

1 3.3 After Berkley canceled the Policy, RS Construction sought to have
 2 coverage reinstated. In a letter to RS Construction's insurance agent, Brown &
 3 Brown Insurance, dated October 27, 2014, RS Construction requested
 4 reinstatement of coverage and stated that RS Construction was unaware of any new
 5 claims that had been brought against it between October 11 and October 27, 2014.

6 3.4 Based on RS Construction's letter to Brown & Brown, Berkley
 7 reinstated coverage under the Policy, effective October 27, 2014.

8 3.5 Following reinstatement of the Policy, however, RS Construction
 9 again failed to pay its premiums. And, therefore, Berkley sent RS Construction a
 10 letter, dated December 11, 2014, in which Berkley explained that the Policy would
 11 be cancelled, effective the following day—that is, coverage under the Policy
 12 expired on December 12, 2014.

13 3.6 On or about December 13, 2016, Inland Washington's counsel sent a
 14 demand letter to RS Construction and two of its past liability insurers: Berkley and
 15 Navigators Insurance Company. In the letter, Inland Washington alleged that RS
 16 Construction breached the parties' construction contract, and performed negligent
 17 and defective work. Inland Washington demanded payment of \$2,129,147 to settle
 18 its threatened claims against RS Construction. Attached as **Exhibit B** is a true and
 19 correct copy of Inland Washington's demand letter (the "Demand Letter") as it
 20 appears in Berkley's claim file. The documents enclosed with the Demand Letter
 21 are not attached.

22 3.7 RS Construction tendered Inland Washington's demand to Berkley,
 23 and Berkley agreed to defend RS Construction subject to a full reservation of
 24 rights.

25 3.8 On or about January 30, 2018, Inland Washington sued RS
 26 Construction in Spokane County Superior Court, in the matter entitled *Inland*

1 *Washington, LLC v. RS Construction & Excavating, Inc.*, Case No. 18200360-6
 2 (the “Underlying Lawsuit”). Attached as **Exhibit C** is a true and correct copy of
 3 the Complaint in the Underlying Lawsuit (the “Underlying Complaint”).

4 3.9 In the Underlying Complaint, Inland Washington alleges that RS
 5 Construction: continually and repeatedly failed to perform its contractual
 6 obligations; failed to complete the work RS Construction was required to perform
 7 under the parties’ contract; performed work that was of substandard quality,
 8 defective and/or was performed in an un-workmanlike manner; and failed to
 9 exercise reasonable care in the performance of its work. Inland Washington
 10 asserted three causes of action against RS Construction and demanded an award of
 11 damages “in an amount to be proven at the time of trial, but no less than
 12 \$2,129,147, plus prejudgment interest.” Inland Washington also sought to recover
 13 its reasonable attorney fees.

14 3.10 Berkley brings the present action seeking a judicial determination that
 15 it has no obligation under the Policy to defend or indemnify RS Construction in the
 16 Underlying Lawsuit.

17 **IV. CLAIM FOR DECLARATORY JUDGMENT**

18 4.1 Berkley incorporates Paragraphs 1.1 through 3.10 as though fully set
 19 forth herein.

20 4.2 A genuine controversy exists between Berkley, Inland Washington,
 21 and RS Construction concerning the coverage, if any, provided under the Policy.

22 4.3 In the Underlying Complaint, Inland Washington contends that RS
 23 Construction is liable for damages caused by RS Construction’s allegedly
 24 incomplete and substandard work. Further, Inland Washington purportedly
 25 suffered harm caused by RS Construction’s negligent workmanship.

26 4.4 Inland Washington’s claims against RS Construction do not fall

within the Policy's insuring agreement, which provides as follows:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies

* * *

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period . . .

Thus, unless otherwise excluded, the Policy provides liability coverage for “property damage,” caused by an “occurrence,” during the policy period.

4.5 Costs allegedly incurred by Inland Washington to complete RS Construction's unfinished or unsatisfactory work are economic losses and, as such, they do not constitute "property damage" as that term is defined under the Policy.

4.6 The Policy provides commercial general liability (“CGL”) insurance. And, therefore, it is not a performance bond, product-liability insurance, or malpractice insurance. Accordingly, the pure workmanship defects allegedly performed by RS Construction do not constitute an “occurrence” as that term is defined under the Policy.

4.7 The Policy provides liability coverage only for property damage that occurs during the policy period. To the extent Inland Washington contends that

1 RS Construction is liable for property damage that occurred after Berkley
 2 cancelled the Policy, the Policy does not provide coverage.

3 4.8 The Policy also excludes liability coverage for Inland Washington's
 4 claims against RS Construction.

5 4.9 The Policy excludes liability coverage for the insured's "ongoing
 6 operations."

7 This insurance does not apply to:

8 * * *

9 j. **Damage to Property**

10 "Property damage" to:

11 * * *

12 (5) That particular part of real property
 13 on which you or any contractors or
 14 subcontractors working directly or
 15 indirectly on your behalf are
 16 performing operations, if the
 17 "property damage" arises out of
 18 those operations; or

19 (6) That particular part of any property
 20 that must be restored, repaired, or
 21 replaced because "your work" was
 22 incorrectly performed on it.

23 Under Washington law, these exclusions bar liability coverage for the costs of
 24 correcting an insured's defective work and consequential damages that flow from
 25 the insured's work. To the extent Inland Washington alleges that RS
 26 Construction's defective work resulted in property damage, the ongoing operations
 27 exclusions bar coverage.

1 4.10 In addition, the Policy excludes liability coverage for damage to RS
 2 Construction's work

3 **I. Damage to Your Work**

4 "Property damage" to "your work" arising
 5 out of it or any part of it including in the
 6 "products-completed operations
 7 hazard."

8 This exclusion does not apply if the
 9 damaged work or the work out of which
 10 the damage arises was performed on
 11 your behalf by a subcontractor.

12 Under this exclusion, damage to RS Construction's work arising out of its
 13 operations that occurred after RS Construction completed its operations (which are
 14 included in the "products-completed operations hazard")¹ are not covered, unless
 15 the property damage arose out of a subcontractor's work. In the Underlying
 16 Complaint, Inland Washington does not allege that RS Construction's
 17 subcontractors performed defective work. And, thus, to the extent the alleged
 18 property damage occurred after RS Construction completed its operations, the
 19 Policy excludes coverage.

20 4.11 The Policy also excludes liability coverage for "continuing damages:"

21 **Continuing Damages**

22 This insurance does not apply to "bodily
 23 injury" or "property damage" or "personal and
 24 advertising injury" which began prior to the
 25 earlier of:

26

¹ The "products-completed operations hazard" is a defined term under the Policy,
 27 which refers to property damage arising out of the insured's work after the insured
 28 completes or abandons its operations.

1. The inception date of the first
2. policy in a series of uninterrupted
3. renewal policies issued by us; or
4. 2. The inception date of this policy.

5 The exclusion applies whether or not:

- 6 1. The damage or its cause was
7 known to any insured before the
8 inception date of the policy;
- 9 2. Repeated or continuous exposure
10 to conditions causing “bodily
11 injury”, “property damage” or
12 “personal and advertising injury”
13 occurred during the policy period
14 or caused additional or
progressive “bodily injury”,
“property damage” or “personal
and advertising injury” during the
policy period; or
- 15 3. The “occurrence” continues during
16 the policy period of this policy; or
- 17 4. The insured’s legal obligation to
18 pay damages was established as
19 of the inception date of this policy.

20 According to this exclusion, if progressive property damage starts before the
21 Policy incepts, the Policy bars coverage. To the extent Inland Washington alleges
22 that RS Construction’s defective work caused progressive property damage which
23 commenced before the Policy incepted, the Policy excludes coverage.

24 4.12 Further, the Policy excludes liability coverage for “new residential
25 construction”:

26 The coverage under this policy does not apply

1 to "bodily injury", "property damage",
2 "personal and advertising injury" or any injury,
3 loss or damage arising out of inadequate,
4 improper, faulty or defective construction
5 arising out of or resulting from "your work" or
6 "your product" involving "residential
7 construction". This exclusion does not apply
8 to "bodily injury", "property damage",
9 "personal and advertising injury" or any injury,
loss or damage arising out of or resulting from
"your work" or "your product" when associated
with work performed by you or on your behalf
by a subcontractor in or along "utility
easements".

10 "Residential construction" means all
11 development, design, building or other
12 construction, improvements, site selection,
13 surface or subsurface site preparation, or any
14 work, products or component parts thereof or
15 services provided in relation to any of the
16 foregoing, involving property intended in
whole or in part for residential habitation, or
any common or public areas or facilities
related thereto.

17 "Residential construction" does not include
18 "non-structural repair work" which is begun
19 after the date of initial occupancy provided
20 such work is unrelated to or does not
21 complete work begun prior to the date of initial
occupancy.

22 "Non-structural repair work" means any
23 residential construction, except residential
24 construction that adds or involves a load
bearing portion of any structure or involves
25 any defect that significantly and adversely
affects use or utility for residential habitation.

26 "Utility easements" are strips of land used by

1 utility companies to construct and maintain
 2 overhead electric, telephone and cable
 3 television lines and underground electric,
 4 water, sewer, telephone, and cable television
 5 lines.

6 Under this exclusion, the Policy does not provide liability coverage for property
 7 damage arising out of the insured's defective work involving new residential
 8 construction. In the Underlying Complaint, Inland Washington alleges that RS
 9 Construction's liability arises out of work performed to construct a new residential
 10 apartment complex—the Copper Trails Apartments. The Policy, therefore,
 11 excludes coverage for Inland Washington's claims.

12 4.13 For these reasons, Inland Washington's claims against RS
 13 Construction are clearly not covered under the Policy. And, therefore, Berkley
 14 seeks a judicial declaration that it has no obligation to defend or indemnify RS
 15 Construction for the claims asserted against it in the Underlying Lawsuit.

16 **V. JURY DEMAND**

17 5.1 Berkley requests a trial by jury.

18 **VI. PRAYER FOR RELIEF**

19 Berkley requests the following relief:

20 6.1 **Declaratory Relief.** That this Court declare and decree that Berkley
 21 has no obligation to defend or indemnify RS Construction for the claims Inland
 22 Washington brought against RS Construction in the Underlying Lawsuit.

23 //

24 //

25 //

26 //

1 6.2 **Other Relief.** For such further relief as the Court deems just, proper,
2 and equitable.

3 DATED: June 4, 2018.

4 BULLIVANT HOUSER BAILEY PC

5 By Dan Bentson
6 Daniel R. Bentson, WSBA #36825
7 E-mail: dan.bentson@bullivant.com

8 Attorneys for Plaintiff Berkley Assurance
9 Company

10 4847-5029-8214.1